

JUL 31 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE ANGEL RUIZ-CHAVEZ,

Defendant - Appellant.

No. 07-10363

D.C. No. CR-06-00131-BES

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Nevada
Brian E. Sandoval, District Judge, Presiding

Submitted July 22, 2008^{**}

Before: B. FLETCHER, THOMAS, and WARDLAW, Circuit Judges.

Jose Angel Ruiz-Chavez appeals from the 63-month sentence imposed following his guilty-plea conviction for illegal re-entry after deportation, in

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

violation of 8 U.S.C. § 1326(a). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we vacate the sentence and remand for resentencing.

Ruiz-Chavez contends that the government's refusal to move for an additional one level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(b) is arbitrary on its face. The government cannot refuse to file a motion under this provision on the basis of an unconstitutional motive, or arbitrarily. *See United States v. Espinoza-Cano*, 456 F.3d 1126, 1136 (9th Cir. 2006). Here, the district court neglected to make a finding regarding whether the government improperly declined to file the motion.

Ruiz-Chavez notified the parties of his intent to plead guilty two months after his arraignment, and over one month before his scheduled trial date. There is no evidence that the government expended any resources on trial preparation. Accordingly, Ruiz-Chavez has satisfied his threshold evidentiary burden to show unconstitutional motive, or arbitrary government action. *See id.* Remand to the district court is necessary to determine whether the government based its decision not to file the motion on an unconstitutional motive, or arbitrarily. *See United States v. Gomez-Mendez*, 486 F.3d 599, 607 (9th Cir. 2007).

VACATED and REMANDED.